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ABSTRACT

This paper examines several aspects of the private prison debate: (1) How much scope is there for improving the technical and economic efficiency of incarceration through contracting-out to private prison entrepreneurs? (2) Will a fully developed corrections industry be sufficiently competitive to ensure that any efficiency gains are passed on to the taxpayers? and (3) Would contracting-out for prison management create the opportunity for private firms to exercise influence, illegitimately and inefficiently, over public decisions about corrections? This assessment yields the following major conclusions: (1) neither theory nor the limited data that exist suggest that the task of incarceration is very well suited to the advantages offered by profit-seeking organizations--chiefly, cost consciousness and an aptitude for innovation; (2) there are serious structural barriers to genuine competition for prison management contracts; (3) in general, the enterprise of incarcerating people has relatively little scope for technical progress in trimming costs; (4) even if private-prison corporations succeed in cutting costs, there is unlikely to be sufficient competition in any given community to ensure that the savings result in diminished government budgets for corrections; (5) there is a substantial likelihood that government contracts with prison corporations will fully protect neither the interests of the public nor the prison inmates; (6) although private prisons might not be as unaccountable or inhumane as some critics have predicted, neither do they offer anywhere near the advantages promoted by their advocates and agents; (7) incarceration today remains a symbolically potent public function; and (8) dismissing widespread uneasiness among policymakers about introducing profits into punishment and corrections requires far more compelling practical advantages than private prisons are likely to deliver. Six pages of notes are included at the end of the paper. (NLL)

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Prisons For Profit: Public Justice, Private Interests

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John D. Donahue is an assistant professor at Harvard University's John F. Kennedy School of Government. He is co- author of *New Deals: The Chrysler Revival and the American System*. His current work concerns the private sector's role in publicly financed undertakings. A book in progress, from which this study is adapted, examines a range of publicly funded, privately performed functions including weapons production, subsidized occupational training, economic development projects, and health care, as well as the privatization of traditionally public services such as corrections.

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Prisons For Profit: Public Justice, Private Interests

Executive Summary

In recent years, tougher sentencing practices—combined with public resistance to new prison construction—have led to overcrowded corrections facilities, worsening prison conditions and a wave of prisoners' rights lawsuits. Sensing business opportunities, new firms have formed an embryonic incarceration industry, advertising an ability to run correctional facilities more efficiently than public institutions. The bid is often appealing to hard-pressed officials, eager for ways to solve managerial and political problems while lightening the burden on taxpayers. Many people, however, both in and outside of government, have objected to allowing the profit motive to become the guiding motivation for so important a governmental function.

This paper examines several aspects of the private prisons debate including:

- How much scope is there for improving the technical and economic efficiency of incarceration through contracting-out to private prison entrepreneurs?
- Will a fully-developed corrections industry be sufficiently competitive to ensure that any efficiency gains are passed on to the taxpayers?
- Would contracting-out for prison management create the opportunity for private firms to exercise influence, illegitimately and inefficiently, over public decisions about corrections?

This assessment yields the following major conclusions:

A) Neither theory nor the limited data which exist suggest that the task of incarceration is very well suited to the advantages

offered by profit-seeking organizations—chiefly, cost-consciousness and an aptitude for innovation.

B) There are serious structural barriers to genuine competition for prison management contracts; not only are incumbent contractors likely to become entrenched, but the quality of performance may be so difficult to monitor and evaluate that quality-based competition is unlikely to develop.

C) In general, the enterprise of incarcerating people has relatively little scope for technical progress in trimming costs; once the decision to imprison a criminal has been made, the task does not allow much room for innovation.

D) Even if private-prison corporations succeed in cutting costs, there is unlikely to be sufficient competition in any given community to ensure that the savings result in diminished government budgets for corrections.

E) There is a substantial likelihood that government contracts with prison corporations will fully protect neither the interests of the public nor the prison inmates.

F) While private prisons might not be as unaccountable or inhumane as some critics have predicted, neither do they offer anywhere near the advantages which their advocates and agents promote.

G) Incarceration today remains a symbolically potent public function; dismissing widespread uneasiness among policymakers about introducing profits into punishment and corrections requires far more compelling practical advantages than private prisons are likely to deliver.

I. INTRODUCTION

Few roles in our American society seem more inherently "public" than those of the police, the judges and the jailers.

Yet despite the long tradition of assigning the justice system as the exclusive province of government, the private sector in the United States of the late 1980's has a foothold in the three principal components of our justice system: police services, the courts and corrections.

Our towns and cities, for instance, now feature more private security guards than public police officers. While criminal courts today remain wholly in the public sector, plaintiffs and defendants in many civil cases have abandoned crowded public courtrooms in favor of a variety of private arbitration and mediation services—many of them operated for profit.[1]

The expansion of the private sector's role into prisons and corrections began to generate considerable interest and controversy by the mid-1980's. Corrections departments in all but a few states already were contracting with private firms to *construct* prisons or provide various support services, and two-thirds of the nation's facilities for juvenile offenders had become privately run (though seldom for profit).

In the past few years, however, several substantial corporations have launched aggressive marketing campaigns to persuade corrections officials and legislators to privatize the job of incarcerating adult criminals. While aspiring prison entrepreneurs promise lower costs and superior performance, opponents warn of unaccountability and challenge the legitimacy of delegating so central a societal function.

As the overcrowding in America's 5,000 prisons, local jails and correctional institutions continues, it is prudent to appraise the still-limited data on prison privatization and to assess the soundness of proposals for an expansion of prisons-for-profit.

II. THE CHRONIC PRISON CRISIS

Proposals for expanding the private sector's role in corrections have arisen amidst the confluence of demographic, legal and political trends that, for the past decade or so, has been termed "the prison crisis."

This crisis has been fueled primarily by quantum leaps in prison populations. From the mid-1920's through the mid-1970's, the number of state and federal prisoners edged up haltingly and unevenly from around 100,000 to around 200,000. But around 1974 prison populations began to surge, reaching 300,000 by 1980 and 500,000 by 1985.[2] In 1970, fewer than one out of every 1000 Americans was serving a term in a state or federal prison; in 1985, it was more than 2 out of 1000.[3]

The surge in imprisonment has several causes, the simplest of which is demographic: the Baby Boom generation hit its most crime-prone years, as America's male population aged 20-through-29-years peaked in 1984. But the increase in crimes and arrests exceeded what could be explained by demographic trends, and the increase in convictions and imprisonment, in turn, exceeded what could be explained by crime rates. Some might point to a decay of morality and a consequent rise in hard-core delinquency; others cite a growing vindictiveness in public opinion and an eagerness to lock up erring citizens. In either event, the fear of crime and the urge to punish seem far more vivid in the public consciousness than the concrete fact that imprisonment necessarily implies prisons—which must be built, staffed, and maintained. This leads to peculiar strains on the public agenda.

In 1968, when American prisons held fewer than 200,000 inmates, 63 percent of the surveyed public said that courts were too lenient with criminals. In 1978, the prison population neared 300,000—and 88 percent of respondents felt courts should be tougher.[4] Support for vigorous anti-crime policies remains high, and public opinion frequently equates crime control with lengthy prison terms. North Carolinians were surveyed in 1985 as to the appropriate punishment for various crimes. Respondents called for long stretches of hard time for burglary, car theft, and other crimes far short of murder, rape, or major drug dealing. Only five percent, for example, thought a year and a half in prison was too stiff a sentence for two teenagers caught breaking into a house to steal a TV and stereo.[5]

An October, 1985, survey found that two out of three Kentuckians opposed a proposal to modify the state's penal code, insisting on long prison terms for all repeat offenders.[6] The same respondents supported, by large majorities, increased state spending on health, education, and highways—but fewer than half endorsed more spending on Kentucky's severely-strained prison system.[7] Similarly, 43 percent of Flori-

dians polled in 1985 declared themselves "extremely concerned" about crime (and most of the rest were "concerned"), but building prisons was by far the least-popular of the 12 alternative uses of state funds covered in the survey.[8] "Jails unquestionably are the most unpopular of all improvements we finance," observed a senior vice-president of E.F. Hutton.[9] Said another municipal finance specialist, "Jails are expensive. People would rather spend money on schools, parks, and transportation. But they want the criminals off the street."[10] The public's contradictory sentiments—in favor of locking up criminals yet against building prisons in which to lock them up—have their effect on governmental practice. Elected officials and their appointees push for more arrests, higher bail, and longer prison terms—swelling the ranks of inmates while bond referendums to build prisons and jails frequently are defeated.

The results are predictable: prisons become crowded. In 1984, the population of state prisons averaged 5 to 16 percent over-capacity while federal prisons were overcrowded by 10 to 37 percent.[11] (There is some evidence that prison officials tend to shift their ratings of prison capacity to fit the capacity required. The Statesville Penitentiary in Illinois, for example, was built in 1925 to accommodate 1,392 inmates. In 1978—with no major structural changes—officials reported its capacity as 2,700, a margin of 22 prisoners over its population at the time and, conveniently, the precise number of inmates a federal court order permitted the prison to hold.[12]) While the American Correctional Association drafts standards for the space per prisoner and the physical amenities which prisons and jails should provide, only a small fraction of American detention facilities have been able to meet these standards.[13] "Medical care has been neglected, educational and recreational programs have been ignored, and overcrowding has become the norm rather than the exception," according to a 1986 study. "Even the pretense of rehabilitation is abandoned as prisons are converted into human warehouses."[14]

The reported effects of overcrowding include increased tension among inmates, rises in the rate of stress-related and infectious illness, and violence against other prisoners and prison employees.[15] Between June, 1983 and June, 1984, there were about 19,000 lawsuits filed by prisoners claiming violation of their civil rights.[16] Most of these complaints were directly or indirectly related to overcrowding, and virtually all of them were beyond correction without a major infusion of new funds. Detention facilities in 36 states were under court order to improve conditions in the mid-1980's; in eight states, the entire correctional system faced a judicial imperative to ease overcrowding and related problems.[17]

This, then, is the backdrop for the debate over expanding the private sector's role in corrections. A Pennsylvania state senator justified his sponsorship of a privatization bill in these terms: "I don't think that the private sector can do any worse than what we have now. Our prisons are dangerous. They're very inhumane. I can't imagine prisoners being

treated worse than they are in the public prisons."[18] Early in 1987 the Wall Street Journal endorsed the idea of prisons-for-profit, predicting that "faced with swelling inmate populations, riots, court orders to improve prison conditions, and tight budgets, more states may be inclined to find out for themselves whether private prisons work."[19] The question is whether the prison "crisis", in which conflicting public priorities play so large a role, is the kind of problem that privatization can solve.

III. THE EXTENT OF PRIVATE CORRECTIONS

The total national budget for prisons and corrections currently is about $10 billion per year—slightly more than is allocated for the court systems, about one-half as much as the budget for police services, and well under one percent of total government spending. State governments account for about 70 percent of total corrections budgets; cities and counties spend most of the rest, with the federal government spending only around 5 percent of the total.[20] There are roughly 5,000 institutions in the United States for holding adults in custody, including about 3,300 local and county jails, 700 state prisons, work farms, and other secure facilities, and several hundred halfway houses, federal prisons, detention centers for illegal aliens awaiting deportation, and assorted other confinement centers.[21] Only a tiny fraction of these institutions—around two dozen jails, one minimum-security state prison and one large penal work farm, and a handful of alien detention centers—are privately run, but this proportion seems likely to rise. State legislatures in New Mexico, Tennessee, and Massachusetts have authorized experiments with private state prisons; New Mexico and Texas passed laws authorizing local governments to privatize jails.[22] Prison privatization was a major topic at the 1986 National Governors Association meeting, as Colorado, New Hampshire, Idaho, North Carolina, and Pennsylvania considered similar measures.[23]

Probably the most prominent company in the incarceration industry today is the Corrections Corporation of America, with enterprises including a large alien detention center in Houston, which it built and operates under contract to the Immigration and Naturalization Service,[24] as well as the Silverdale Work Farm in Hamilton County, Tennessee, and several jails. The only privately-run state prison, the Marion Adjustment Center in Kentucky, is the sole venture so far of another player in the incarceration industry, the U.S. Corrections Corporation. The Marion prison is a minimum-security institution, for inmates nearly eligible for

parole, on the campus of a defunct Catholic college.[25] Behavioral Systems Southwest has converted four motels into detention centers for aliens awaiting deportation.[26] Aliens convicted of crimes during their undocumented stays in America serve terms in the 575-bed facility run (for the Federal Bureau of Prisons) by Palo Duro Private Detention Services on the site of a vacant U.S. Air Force base. There are hundreds of non-governmental juvenile correctional facilities, at least two of which are prison-like operations run by profit-seeking firms: a company called Eclectic Communications holds young federal criminals in a secure California facility, and since 1975 RCA has operated the Weaverville, Pennsylvania detention facility for under-age hard-core cases.[27]

Several bids to expand the domain of private corrections have run into trouble. One case in Pennsylvania involved two brothers, Charles Fenton (a former federal prison warden) and Joseph Fenton (a real estate and construction entrepreneur). Their company, Buckingham Security, offered to build and run a large prison near Pittsburgh for holding the hundreds of inmates from around the nation who, for one reason or another, need to be protected from other prisoners.[28] The bid quickly stirred opposition, however, when opponents reported that a jury had implicated Charles Fenton in a brutality case concerning two inmates who were beaten while shackled after they attempted to escape from a federal prison where Fenton was warden.[29] The revelation that the proposed location for the prison was a toxic waste site—which Buckingham had bought for a dollar—also sparked concern.[30] The final blow came when a separate private jail in Pennsylvania, during a shortage of local criminals, imported 55 inmates from an overcrowded Washington, D.C. prison. Pennsylvania protested and obtained a court order sending back the out-of-state prisoners, sending the private jail into bankruptcy. The incident inspired fears in Pennsylvania about the state becoming a repository for outside criminals, and early in 1986 the legislature voted restrictions on the two existing private jails and a moratorium on new for-profit correctional facilities, effectively shelving the Fenton brothers' proposal.[31]

Another abortive initiative was a bid by the Corrections Corporation of America to take over Tennessee's entire correctional system. The company offered to pay the state $100 million (in cash and notes) for a 99-year lease on all 17 prisons, and then to incarcerate convicts for an agreed-upon fee. At five-year intervals Tennessee would have the option of cancelling the contract and—upon compensating CCA for all it spent on acquiring and improving the facilities—the state could regain possession of the prison system to operate itself or turn over to another contractor.[32] "Basically, they want the Corrections Department budget of $170 million a year," said a spokesman for the governor (who favored the bid); CCA claimed that, through superior management, it could run the system at lower cost and still make a profit.[33] The Tennessee legislature, however, was skeptical, and eventually turned down the offer.

IV. THE TERMS OF THE DEBATE

One of the founders of the Corrections Corporation of America has posed an argument for private prisons as essentially a managerial issue: "Public entities," he wrote, "are not managing the prison system effectively...Private entities can. . . manage correctional facilities more economically and efficiently than the government entities" through effecting "personnel economies," buying supplies in bulk, and bypassing "cumbersome purchasing regulations."[34] Beyond promising to deliver the same service more efficiently, corrections entrepreneurs argued that, free of bureaucratic red tape and restrictions, they also could deliver a better, more innovative service. The head of Behavioral Systems Southwest promised that he could outperform governmental competitors on rehabilitation—that once-central but currently distant goal of corrections policy.[35]

The American Correctional Association, a quasi-official organization, has cautiously endorsed the "use of profit and nonprofit organizations to develop, fund, build, operate, and/or provide correctional services, programs, and facilities. . ."[36] And throughout the mid-1980's, a small but growing number of corrections officials tacitly signalled their own views on the issue as they signed contracts with private firms to run jails and detention centers.

The opponents of private corrections, meanwhile, are many and vocal. The National Sheriffs Association adopted a resolution strenuously opposing for-profit jails and prisons in June, 1984, while three-fourths of the correctional agencies polled by the National Institute of Corrections that same year responded that they would not consider contracting-out the management of detention facilities.[37] The American Federation of State, County, and Municipal Employees (many of whose members work in the jails and prisons) issued a statement that "for the public, for correctional personnel, even for the inmates, contracting out is a terrible idea—it's bad policy, and it's bad government."[38] A number of observers with no material stake in the issue have expressed profound misgivings about prison privatization. The American Bar Association adopted in 1986 a resolution urging that "jurisdictions that are considering the privatization of prisons and jails not proceed to so contract until the complex constitutional, statutory, and contractual issues are satisfactorily developed and resolved."[39] The American Civil Liberties Union also opposes for-profit corrections, in part because it fears private facilities would fall short of even the lamentable standard set for inmates' rights by public prisons; the legal director of the ACLU's Pennsylvania branch, testifying before the state legislature, charged that "private prisons by their very nature are time-bombs waiting to inflict injury on those detained."[40]

An overview of government's role

It is important to keep in mind that "the government" is an institutional device, a complex set of relationships whereby a community defines the public business and arranges for its accomplishment. Public acts are carried out by individual men and women who agree, through various types of organizational and contractual arrangements, to serve their fellow citizens. Bureaucracy and contracting-out are two different ways of organizing the people who ultimately do the work. The question, task by task, is what form of relationship between the public and its agents best harnesses the agents' energies to the common purpose, whether that be tending to the community's dependent members or confining its delinquent members.

What we need, ideally, is evidence. The debate over what form of organization works for the public task of corrections would be much tidier if we could assign a tenth or even one-half of the jails in America to private control, ensure that public and private operations receive comparable burdens and resources, devise clear criteria for evaluating performance, and compare the results—after 20 or 30 years—of each organizational structure. A senior analyst who appraised private corrections for the Massachusetts legislature argues that the claims of proponents and the charges of critics will remain sterile and inconclusive until the issue gets "the vigorous examination by disinterested parties that is necessary to produce unbiased assessments."[41]

It is hard to argue with a call for more data. But while facts are indisputably more convincing than hypotheses, they are generally much more expensive. The wisdom of an experimental approach to private prisons proposals depends, first, on how costly—in financial and ethical terms—the experiment is likely to be and, second, how conclusive will be the evidence produced.

Experiments with private corrections carry the risk of heavy costs. Transfers of control may be difficult to reverse, and, in the meantime, the consequences could be severe. The evidence provided by initiatives now underway or envisioned, moreover, is unlikely to settle the issue. Virtually every state prison system already contracts-out for some services—most frequently medical care, food services, maintenance, or transportation. Some officials report that outside suppliers offer higher quality, cost savings, and better accountability. Others, however, report poor quality, inflated costs, and trouble controlling contractors.[42] Without careful studies that control for factors *other* than public versus private organization, the available evidence allows scant conclusive judgment about contracting-out prison services, and even less about the private management of entire prisons.

Worse still, the small sample of detention centers under private con-

trol is by no means random with respect to either facilities or inmates. Most private detention centers are low-security operations for juvenile offenders or aliens who have committed no crime aside from unauthorized border crossing. Private firms' performance in these areas—whether favorable or otherwise—may not necessarily say much about how they will handle higher-security operations. Both of the private prisons in operation as of mid-1987 are minimum-security facilities.[43] *Public* minimum-security prisons have operating costs about 20 percent below those of medium- and maximum-security facilities; comparing the cost performance of the two private prisons with all prisons thus would be seriously misleading.[44]

Cost comparisons may be yet more off the mark if private prisons differ systematically in the characteristics of their inmate populations. The Marion Adjustment Center run by the U.S. Corrections Corporation, for example, costs Kentucky $25 per inmate per day, or about in the middle of the $18-to-$31 range of publicly-run prisons. But inmates are screened for medical and behavioral problems before they are assigned to Marion. "We don't want to overload them with problem cases," the administrative director of Kentucky's corrections system has explained. "We tend to send them the best in the bunch."[45]

Similarly, the Immigration and Naturalization Service rates deportation-bound aliens by the probability of escape attempts, saves its own facilities for the tougher cases, and assigns the more docile to the contract detention centers.[46] Such practices ensure that the evidence yielded by such experiments will remain inconclusive.

Finally, early experiences with contracting-out for incarceration may not be representative of the final form a fully-developed private corrections industry would take. Costs could fall and performance could improve over time as firms gain experience and new entrants heighten competition. Or costs could rise and performance decay as a few dominant firms become entrenched and public corrections departments are dismantled, leaving governments with no alternative to private jails and prisons.

The ongoing debate surrounding for-profit hospitals counsels against any expectation that evidence about the pioneers' performance will soon settle the private prison issue. For-profit hospitals have existed for decades, and now account for more than 10 percent of all hospitals. Several major statistical studies have attempted to weigh the effect of a hospital's organizational form on costs, service to the poor, and other dimensions of performance. But consensus remains elusive because there is so much room for variation in selecting samples to compare, choosing methodologies, and defining the dimensions of quality and efficiency. Incarceration is perhaps as subtle, complex, and difficult an undertaking to evaluate as hospitalization, and it seems likely we could experi-

ment for decades with private prisons without conclusive evidence of efficiency, cost, or quality.[47] Thus any practical analysis of the private prison question must supplement the available data with reasoning, informed conjecture, and judgment about the public task of incarceration and the suitability of profit-seeking agents for carrying out that task.

V. THE DELICATE TASK OF CONTRACTING

The main advantages of using bureaucracies to carry out public tasks are control over the means agents employ and flexibility—the right to amend mandates without the awkwardness and vulnerability of recontracting. The chief virtues of assigning public tasks to profit-seeking agents are the cost discipline inspired by competition, and the benefits of innovation by agents motivated to discover better ways to deliver value. The potential benefit of contracting-out depends upon the precision and durability of the contractual link between creating value and collecting profits. The quality of this link depends, first, on the existence of lively and realistic competition, second, on how carefully and completely the product can be specified, third, on the degree to which quality can be monitored, and finally, on the government's ability and inclination to reward, penalize, or replace contractors on the basis of performance.

Accordingly, when we are assessing the wisdom of investing in greater private involvement in corrections and incarceration, we must consider three fundamental questions:

- Is incarceration the kind of enterprise which can be made substantially more efficient through innovation and tighter management?
- How precisely can our government assess the quality of private prison operations, monitor their performance and enforce accountability?
- Can private prison contractors manipulate the community's perception of its needs for jail and prison services?

VI. THE SCOPE FOR COST CONTROL

As a general rule, organizations confronting competition will be more efficient than organizations secure against challenge. Workers and managers in a position to benefit (directly or indirectly) from efficiency improvements generally will be more energetic in reducing costs than those with no such prospects. And lower costs, in a competitive market, generally will translate into lower prices. Whether and how these basic precepts apply to the corrections issue depends first on the *technical* scope for efficiency gains in the task at hand, and second, on the nature and degree of competition in the incarcerations industry.

The Corrections Corporation of America estimates that private organization should lead to costs 10 to 25 percent below those of public corrections bureaucracies. When CCA took over the Silverdale Work Farm in Tennessee, it charged the county $21 per prisoner per day, a 12.5 percent saving over the cost under county management.[48] When Bay County, Florida, solicited proposals from private firms for managing its jail, CCA's winning bid was fully 20 percent below the sheriff's proposed budget.[49] But CCA has lost money in every year since it began reporting results in 1984, for a 1984-86 aggregate loss of $6.8 million on revenues of $24 million. The fact that CCA has been losing money steadily at the prices it charges gives little cause for confidence in private management's cost edge.[50] Sooner or later it will have to lower its costs, raise its prices, or go out of business.

The question is: Will private management offer *durable* efficiency gains and cost savings for taxpayers? Studies by the Pennsylvania and Massachusetts state legislatures and the National Institute of Justice each have found there to be no reliable statistical data whatever—and anecdotal reports have been too thin and too scattered to support any real conclusions. Lacking large-scale, long-term experience with private prisons, we might seek lessons in comparable endeavors with longer histories and richer stores of data. Private organizations—profit, nonprofit, and voluntary—for years have been involved in juvenile corrections. Do differences between public and private custodial facilities for juveniles suggest anything about the efficiency of alternative organizational forms? Table 1 summarizes the data.

The cost differences are minuscule.[51] The total cost per resident of private facilities is a bare one percent higher than that of public centers. But the private juvenile-corrections field is growing more quickly, so private centers spend more, on the average, for investment. *Operating* costs are lower for private centers—but by only three percent. One could argue that merely matching public costs shows that private facilities are more efficient, since they are generally smaller and lack economies of scale. Alternatively, one could argue that public centers are more effi-

Table 1
Custodial Centers for Juveniles, 1985

	Public	Private
Number of facilities	1,040	1,996
Average number of residents	48	17
Average age	15.4	14.9
Staff-to-resident ratio	1.15	1.19
Less than 70 percent full	35%	20%
Over 100 percent full	10%	1%
Average stay (days)	33	120
Total cost per resident *	$22,600	$22,845
Operating cost per resident *	$22,000	$21,300
Capital spending/total spending *	3.7%	6.3%
Growth from 1979 to 1985	14%	19%

* 1982 data

cient, since they deal with slightly older and potentially more troublesome residents, have higher turnover, and—with less control over the flow of juvenile delinquents sent by courts or social agencies—are more plagued by under-capacity and over-capacity. Finally, many of the private centers are run by non-profit organizations, which presumably are less devoted to cost-control than the for-profit firms which bid to operate secure adult prisons and jails.

Detaining illegal aliens may be more closely analogous to the task of imprisoning adults than handling juvenile delinquents. The U.S. Immigration and Naturalization Service assigns illegal aliens in its custody to any of seven detention centers it operates itself or to five "contract centers" run by for-profit firms. The INS has a reputation for writing thorough contracts and driving a hard bargain—and at one point reported that the private facilities, because of lower wage and benefit costs, offered it a 6 percent cost saving. This was less than the 10 to 25 percent range promised by other private-corrections proponents, but nonetheless a respectable economy.[52] Unfortunately, the available cost comparisons fail to support this claim. The cost to the INS—per detainee, per day—averaged nearly 20 percent *higher* at contract centers.[53] This does not, of course, prove that private facilities are inefficient. Factors aside from ownership status may affect the cost of detaining illegal aliens, but the INS experience is at best inconclusive on the issue of superior private-sector efficiency.

We are left, then, with conjecture about the possible sources of and incentives for more efficient private performance. It is easy to imagine unacceptable ways an economy-minded warden could cut the cost of incarceration. He could dispense with expensive walls, bars, gates and locks by surrounding the jail with a minefield. He could abandon efforts to protect prisoners from their violent or deranged fellow inmates. He

could feed the prisoners only bread and water, hire them out as slaves to earn their keep, and scrimp on shelter and medical care. But the question is how costs can be reduced while fulfilling the public mandate to detain prisoners humanely. There are two fundamental ways to cut costs without lowering quality: using fewer resources (by using them more wisely), or paying less for the resources used.

There is some evidence that private firms are better than corrections bureaucracies at economizing on the resources required for incarceration. Behavioral Systems Southwest detains illegal aliens in converted motels; CCA's Houston alien detention center was expressly built to be useful as a warehouse if the detention business hits a slump. Using such structures—when they do the job—represents a genuine efficiency gain over specialized detention buildings which must stand empty when they are not needed to hold prisoners. Private corrections firms also could cut costs through automation—using more surveillance cameras and fewer guards, for example.

But, in general, incarcerating people is an enterprise with relatively little scope for resource-sparing technical progress. There is a range of alternatives *to* incarceration—probation, parole, electronically-enforced house arrest, community service, execution, forgiveness, exile, and so on. But once the task is defined as imprisonment, the range of alternative technologies seems fairly narrow. Prisoners must be sheltered, fed, cared for when sick, protected from each other, and prevented from escaping. These do not appear to be the type of tasks that allow for major innovations in technique.[54]

Labor accounts for roughly 60 percent of the overall costs of corrections,[55] and both proponents and critics cite lower labor costs as a key feature of private prisons. Corrections firms and some legislators hail private management as a device for weakening or breaking corrections workers' unions and easing the burden on taxpayers by lowering wages and benefits. Those same unions, meanwhile, are the most vigorous and effective opponents of privatization, warning that economizing on labor will victimize workers directly and inmates indirectly.

The essential question on the labor-cost issue is this: Are corrections workers collecting what economists refer to as "rents"—compensation beyond fair pay for the work required? If so, private management might be a valuable tactic for paring excessive wages and benefits. If not, private firms will be unable to reduce labor costs without debasing the quality of the workforce and, with it, the conditions of confinement for prisoners.

The starting pay for prison guards at the Massachusetts Correctional Institute at Concord is $22,000 a year.[56] Are they overpaid? On the one hand, this is triple the minimum wage, for a job that requires no advanced degrees and no heavy lifting. On the other hand, it involves unpleasant working conditions and a great deal of stress. (Prison guards suffer from high rates of alcoholism, domestic problems, and suicide.) Most tellingly, the state has trouble finding people willing to take the jobs at that

Table 2

	Public Corrections Workers	Private Security Guards
Average hourly wage	$6.80	$5.91
Average annual earnings	$13,757	$10,206
Full-time, full-year	80%	55%
Age 25 to 54	77%	49%
High school graduates	87%	67%

salary—turnover at Concord is about 40 percent and there are usually unfilled posts.[57] Prison guards' pay and benefits vary widely from jurisdiction to jurisdiction, however, and by carefully selecting examples one could document both the argument that prison guards are overpaid and the argument that they are underpaid. What do the national numbers show?

The most recent aggregate data are from the 1980 census, which included a tally of earnings by occupation, age, and education. Prison work does not appear to be particularly lucrative. The hourly pay of male correctional officers—and 86 percent of all guards are male—was a bit less than 80 percent of the average pay for all males.[58] (The female guards, interestingly, earned 8 percent *more* than the female average.) This means little on its own, however. Whether or not there are "rents" to be pared away by efficiency-minded private operators depends on whether other people would be willing to do the same work more cheaply. Suggestive evidence on this score might be found by comparing the data for public prison workers with data for a related set of workers: security officers who work for private firms. Table 2 summarizes the comparison. (Figures in the table refer to male workers only.)[59]

Private security guards (representing one of the main labor pools from which *private* prisons presumably would draw their employees) command about 15 percent lower wages than do public correctional workers. Since payroll costs, as noted, are about 60 percent of total prison costs, cutting the wage bill by 15 percent would, on its own, offer private corrections firms a 9 percent cost advantage. Cutting this sum from the corrections budget nationwide would save taxpayers roughly a billion dollars a year. Does this mean a gain in efficiency? Not necessarily. The costs of the two workforces differ—but so do their characteristics. Public guards are far more likely to be high school graduates, to work full-time and year-round at their jobs, and to be of prime working age. Employers who hire from the private-guard labor pool pay less mostly because they get less; lower labor costs may mean a lower-quality workforce.[60] While data on private *security* guards probably fail to fully reflect the characteristics of the people who will become private *prison* guards, it seems unlikely that private operators can cut labor costs drastically without affecting the conditions of prisoner confinement.

One clear cost *disadvantage* of private prisons is that private-sector

employees, unlike civil servants in many states cannot be denied the right to strike.[61] A prison cannot easily be shut down, and temporarily replacing strikers—even if possible—is likely to be expensive and disruptive. Private prison guards would likely enjoy greater bargaining leverage, and eventually may negotiate richer wage and benefit packages than public guards have achieved.

VII. COMPETITION AND CONTRACTING

Lower *costs*, however achieved, need not lead to lower *prices*. Without competition or tightly-drawn contracts, savings on wages and other costs increase profits instead of being passed on to the clients. Will the incarceration industry, once it matures, be competitive? Perfect competition—many alternative suppliers, ease of entry and exit, full information, and so on—is out of the question here. But what are the prospects for "good enough" competition?

Three points suggest caution. First, even if the number of corrections firms eventually exceeds the current handful, it is unlikely that there ever will be more than a few serious contenders in any given region at any given time. Second, firms are likely to face substantial costs of entering the incarceration industry, as well as potential *exit* costs (particularly if any entrant must invest in specialized buildings) high enough to deter many firms from experimenting with the business. Third, even if there are a number of firms bidding to take over when a city, state, or county first decides to privatize, jurisdictions will probably find it difficult to switch contractors if their incarceration company disappoints them.[62]

Private prison operators generally will make substantial start-up investments to begin operations in an area, and accordingly will demand multi-year contracts (CCA's contracts generally run for 20 to 30 years[63]) or else require compensation if contracts are cancelled. The Corrections Corporation of America's proposal to take over Tennessee's prison system, for example, committed CCA to extensive capital investments beyond simply leasing the existing physical facilities. It allowed the state to opt-out at regular intervals, but only if it compensated CCA for all the investment costs incurred since the start of the contract, making it quite costly for the state to shift to a competitor. In any event, a change of management in a jurisdiction's corrections system is likely to be awkward at best and, more likely, seriously disruptive. Thus, even if private management results in greater efficiency, we cannot expect lively enough competition in the prison industry to ensure that cost savings will be passed on to governmental clients.

Incarceration is a complicated undertaking. The contract regulating the relationship between the jurisdiction and the corrections firm is likely to be correspondingly lengthy, detailed and tricky to write. An official of the Federal Bureau of Prisons, who broadly favors private prisons, nonetheless laments that the "difficulty is in knowing what to ask for and how to ask for it in the RFP."[64] Who pays the medical bills when an inmate in a private prison contracts AIDS? Who is liable if he sues, claiming wrongful exposure to the disease while imprisoned? How are changes in incarceration costs shared if the number of convicts rises or falls sharply from year to year? If facilities are destroyed in a riot, who pays to rebuild them? (Consider, for instance, the landslides of litigation following the recent rioting, hostage-taking and destruction of property by hundreds of Cuban inmates in Louisiana and Atlanta if either federal prison had been privately operated for profit.) Attempts to spell out contingencies and assign rights and duties for each conceivable case will be awkward and burdensome, and will almost surely fail to cover everything. But gaps and ambiguities mean vulnerability. The same diffused stake in cost savings that makes governments prone to inefficiency tends to make them less vigilant in writing and interpreting contracts to protect the public interest.[65]

For example: Hamilton County, Tennessee, operated its new Silverdale Work Farm for less than a year before the Corrections Corporation of America contracted to take it over. The cost per prisoner under county management had been $24 a day; CCA agreed to charge a *per diem* of $21, offering the county a 12.5 percent saving. The $24 baseline, however, had been set while Silverdale held 250 prisoners, or about 75 percent of capacity. In the first year of CCA's management, the number of prisoners sentenced to Silverdale surged, largely due to a tough new drunk-driving law.

Fees to CCA soon exceeded the county's corrections budget. Officials complained that the *per diem* had been based on average *total* costs, consisting of mostly fixed costs that did not vary with the number of prisoners. The incremental cost per prisoner—as long as no new construction was needed—was more like $5. "It would never have been that much if the county was still running the facility," according to Hamilton County's Superintendent of Corrections. But CCA's marketing chief insisted, "We haven't charged them a dime more than we said we would," which is perfectly true. The problem, from the county's perspective, was a contract that failed to consider cost structures or anticipate contingencies such as a new law and tougher sentencing.[66] Some jurisdictions surely will write more sophisticated contracts than the one that left Hamilton County disappointed—but, just as surely, others will not.

As the Silverdale example illustrates, contracts allocate risks—in this case, uncertainty about the demand for incarceration. By privatizing its work farm, Hamilton County shifted the risk to CCA. Whatever the cost

of incarcerating a prisoner turned out to be, the county locked in its liability by agreeing with CCA on a *per diem* rate. Had the citizens of Hamilton County suddenly become law-abiding—or a soft-hearted new judge refused to send delinquents to the work farm—CCA's earnings would have dropped. As it happened, the incarceration rate rose, and the work farm became a profit center. One could come up with an argument that the county had no more valid grounds for complaint than does the airline passenger who buys flight insurance and subsequently fails to crash; had he known he would live through the flight, he could have saved some money. Similarly, had Hamilton County known the average cost per prisoner would drop, it would have held out for a better deal. But uncertainty about the future is the whole rationale of a market for risk.

The issue is whether it makes sense for governments to pay entrepreneurs to relieve them of the risks associated with running prisons. Privatization has been promoted as a way of avoiding the risk of building too much or too little prison capacity.[67] But three considerations argue against the general wisdom of paying private prison operators to assume risk: first, governments in general are better at spreading risks than private companies are, simply because they encompass more people.[68] (In general, the larger entity is the efficient risk-bearer.) Second, state and city governments very likely have better information about crime rates and sentencing practices than do private firms and probably have a degree of control over the "demand" for jail space. (In general, the party with more information and control is the efficient risk-bearer.) Third, *transferring* risk at a reasonable cost requires a contractual sophistication and a concentration of purpose beyond that of many governments.

An additional point here is related to recent court judgments. Governments, it turns out, generally cannot get rid of perhaps the largest risk within the incarceration business, that of liability for damages arising from prisoners' rights lawsuits. Most such suits are brought under Section 1983 of the Civil Rights Act, which provides that any "person who, under color of any statute, ordinance, regulation, custom, or usage . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in a action of law, suit in equity, or other proper proceeding for redress."[69] Courts passing judgement on claims of Eighth Amendment violations under private detention have taken a broad view of this "color of law" criterion.

For example, when illegal aliens were discovered stowed away on a ship in an American port in 1981, the Immigration and Naturalization Service arranged for them to be temporarily detained by Danner, Inc., a private security firm. The facilities were neither big enough to hold the stowaways in tolerable conditions nor secure against escape. When some detainees forced the door and attempted to flee, an untrained guard

opened fire, killing one alien and seriously hurting another. In the suit that followed, the court found that the INS, the officials who arranged for private detention, and Danner, Inc., were jointly and severally liable for damages.[70] Governments thus are likely to end up with little or no less liability in prisoners' rights suits—and a good deal less control over the conditions of imprisonment.

VIII. QUALITY CONTROL AND THE CONDITIONS OF INCARCERATION

While the *total* cost of corrections has surged in the United States, the cost per prisoner has fallen, in real terms, from its peak around 1980. The cost per prisoner has been reduced, of course, primarily by overcrowding prisons, forgoing maintenance, abandoning rehabilitation, and otherwise degrading the conditions of confinement. This raises the question of whether corrections entrepreneurs envision a comparable but more deliberate and aggressive approach to cost control. Will private prisons neglect and abuse inmates in the name of budget savings? The previous section's speculation about the limited scope for pure efficiency gains suggests the possibility. There are obvious *technical* opportunities to do so.[71] There are also precedents. Princeton corrections expert John J. Dilulio has written about practices in earlier decades:

> In Texas, Michigan, California, Arkansas, and many other jurisdictions, all or part of the prison system has at one time or another been privately owned and operated. The history of private sector involvement in corrections is unrelievedly bleak, a well-documented tale of inmate abuse and political corruption. In many instances, private contractors worked inmates to death, beat or killed them for minor rule infractions, or failed to provide inmates with the quantity and quality of life's necessities (food, clothing, shelter, etc.) specified in their often meticulously-drafted contracts.[72]

And there are scattered contemporary incidents of cost-cutting leading to mistreatment, despite the generally high quality of private detention facilities. In a CCA detention center with no mental health officers on staff or on call a Salvadorian detainee's mental state eroded, over the course of five months, from depression to catatonia, before action was finally taken.[73] But, to repeat, there is no sure way to know whether private prisons will end up more or less humane, on average, than public ones. Tales of bad conditions or brutality at a private facility can be matched by anecdotes about the horrors of public prisons or about

the superiority of private prison conditions."[74] The anecdotes cut both ways—and settle nothing.

There is no reason to believe that most *current* private prison entrepreneurs are anything but honest and humane business people who hope to cut costs through better management, not lower quality. But the issue is the shape a fully-developed incarceration industry is likely to take, and on that score the integrity of the pioneers does not matter much. If a central goal of privatization is saving money, if incarceration contracts are awarded on the basis of costs, and if it is technically possible to cut costs by lowering standards, then quality control becomes an urgent issue. Are the people now bidding to run prisons willing to make money by brutalizing inmates? Almost certainly they are not. Are there within our economy people who would be willing to make money by brutalizing inmates? Almost certainly there are. And without robust measures to guarantee the conditions of confinement, the business people least constrained by scruples are likely to enjoy a competitive advantage in the imprisonment industry.

In most businesses, quality is enforced by the customer's grasp of his own preferences and his freedom to abandon suppliers who let standards slip. In a few industries where the immediate consumers are unable to evaluate or respond to quality—such as nursing homes and day care centers—there have been periodic scandals over deplorable lapses in performance. Prisoners are conspicuously unable to take their business elsewhere, however dissatisfied they are. The "customer" in this case may be not the prisoner, but the rest of the citizens who pay to have delinquents locked up. If the community wants the conditions of confinement to be short of luxurious but well this side of cruel and unusual, the issue becomes the standards set for prison operators (public and private) and the community's inclination and ability to monitor conditions and enforce its standards.

If comprehensive contracts could easily be written, performance perfectly monitored, and promises costlessly enforced, then private prisons would provide exactly the conditions of incarceration the community desires. There are few objections to private involvement in corrections that cannot be answered by calls for careful contracting and rigorous performance evaluation.[75] If contracts will be perfectly enforced, the potential efficiency gains need not be very great to grant privatization a measure of appeal.

But *will* private prisons be adequately monitored? "The claim that our level of visibility is so low that we will be able to cut corners is ludicrous," insists the president of the Corrections Corporation of America. "We are the highest profile people in corrections today."[76] And so they are, today. But will the press, the public, and academics maintain their scrutiny as the incarceration industry matures? Nobody can

say for sure. It seems likely that as private prisons become less novel, attention will flag.[77] Less visibility would mean less pressure on jurisdictions to hold private prisons accountable, and correspondingly less vigorous enforcement of cost standards, quality standards—or both. One might legitimately wonder whether a public that has refused to put up the resources to bring public prisons up to minimal standards will resist the temptation to turn a blind eye on the conditions of confinement in bargain-rate private prisons.

IX. THE POTENTIAL FOR DISTORTING PUBLIC CHOICES

The collective demand for imprisonment—like the demand for military power—depends only in part on objective facts about world conditions, and perhaps more significantly on citizens' shifting hopes and fears. For collective purchases such as national defense and criminal justice, "value" is a notoriously subjective and complex notion since preferences are not only plural but also indirectly expressed.

The incarceration rate, as discussed earlier, is only loosely linked with the crime rate, suggesting that our feelings about crime—and not only the simple reality that some of us break laws—greatly affect our inclination to lock up people. Examining the origins of the now-routine corrections "crisis"—citizens fear crime, want criminals incarcerated, but refuse to pay for prisons—similarly cautions against an exclusively rational approach to understanding the imprisonment issue. In an area where policy is so heavily shaped by variable perceptions, where the citizenry's capacity for delusion is so thoroughly demonstrated, it is only prudent to consider the public's vulnerability to manipulation if we opt for private corrections. Three issues merit attention.

The first (and probably least disturbing) possibility is that privatization amounts to a fiscal sleight-of-hand which violates duly-established procedures for obligating public resources. Many jurisdictions are considering private corrections in the wake of bond referendums denying officials the funds to build public prisons, despite severe under-capacity and even court orders to curb overcrowding.[78] Thus part of privatization's appeal is a matter of budgetary gimmickry: bonds to build prisons usually must be cleared by referendum, while yearly appropriations to pay a corrections contractor need not.[79] Contracting-out, even if it costs much more in the long run, offers jurisdictions a way around the public's refusal to pay for the prison cells it insists on filling.[80]

Is this conflict between the imperatives of the ballot box and the imperatives of the bench a problem privatization can solve? Perhaps—if current capacity requirements are only temporary, if private firms have an edge in adding and subtracting prison capacity, if the contracts are in fact (and not just in form) short-term and revocable, and if the public's rejection of new buildings in favor of contracting is rooted in this logic.

But projecting the demand for prison space has proven hazardous. The "crime-prone" population is shrinking only slightly, and public sentiment in favor of tough sentencing shows no signs of abating.[81] Unlike detention centers for aliens or juveniles, secure adult prisons require special structures with limited alternative uses. If new prisons are built and the need for them subsequently drops, *somebody* gets stuck with the extra cell space. Correction entrepreneurs—unless they are incompetent—will accept this risk only for a price, or else ensure that jurisdictions are effectively bound to renew what are technically short-run contracts. It seems unlikely that private firms have any special advantage in bearing the risk of over-capacity; thus it is unlikely that a jurisdiction is better off contracting-out for peak capacity than it would be to build it.

A system of private corrections thus might debase the process of collective choice by obscuring information about the cost of incarceration. It could, conceivably, instead *improve* the flow of information. Several privatization proponents have suggested that by spotlighting the link between costs and prison conditions, contracting will help remedy the public's self-delusion and demonstrate that locking up criminals without violating their constitutional rights simply requires more money. Private facilities, they contend, will be better (albeit more expensive) and will set standards to which public prisons (willingly or under court orders) will aspire.[82] This is an interesting scenario. But the pitch for private prisons to date has generally emphasized cost control more than quality improvement. And one might wonder why the voters who have refused resources to public prisons should be more forthcoming once the form of management changes.

The second issue concerns prison rules, indeterminate sentencing, and parole. The time a convict serves in prison depends in part on the crime he committed, in part on the judge he happens to draw, in part on sentencing guidelines and public opinion, but also in large part on his perceived behavior while behind bars. All prisons have rules, and infractions are often punished by what are effectively extra prison terms—the denial of the "good time" which hastens parole. When a corrections contractor makes the rules, compiles infractions, and recommends (or does not recommend) prisoners for parole, private actors are taking on far more central roles in the justice system than simply managing the physical facilities.

The chief of one private detention center, in an effort to reassure,

said that while lower-level guards have some responsibility for policing behavior, "I review every disciplinary action. I'm the Supreme Court."[83] This should make us nervous.[84] Might profit-seeking prisons multiply rules during slow periods in order to ensure enough infractions to deny parole to existing inmates until new convicts come to fill the cells? The possibility warrants caution. It is even conceivable that an unscrupulous corrections entrepreneur would perversely rig parole recommendations to release prisoners who are troublesome, dangerous, sickly, or otherwise expensive to detain, while holding on to the more profitable inmates. Public prison officials are at least free of any direct financial temptation to manipulate the prison population.

The profit motive will probably not push prison operators to such extremes. And there are remedies—consigning discipline to a residual staff of civil servants; deputizing private guards; setting up more formal evaluation procedures for parole candidates, and so on. But they likely will be incomplete, and will be costly.[85] The problem of the "internal" justice system may not make the case against private corrections, but it is a major ethical and practical drawback.

The third issue concerns corrections companies' abilities to influence officials and shape public opinion. Opponents of private prisons stress this point. One worry is simple corruption. Another concerns more subtle efforts to sway public officials that could undermine the integrity of competitive contracting while staying within the law. "They have salesmen tell you what a great bunch of guys they are," said a Louisiana sheriff in reference to corrections entrepreneurs, "and how they'd love to contribute to your campaign."[86] These are the universal dangers of public officials contracting to the private sector, but the incarceration area presents a special cause for concern. Since the public's enthusiasm for imprisoning criminals is demonstrably variable, might it not vary in response to publicity campaigns orchestrated and paid for by firms with a financial interest in locking up more people? "With a 99-year lease, they're going to see to it that people are sentenced," warned an Illinois sheriff. "They're going to lobby against alternative programs, including probationary programs. It's a big business."[87] A former Minnesota Commissioner of Corrections has voiced similar fears: "Private operators whose growth depends upon an expanding prison population may push for ever harsher sentences. With the public's unabating fear of crime, and lawmakers shrinking from any move that appears to be soft on criminals, the developing private prison lobby will be hard to resist."[88]

The question is whether and to what extent public opinion on this issue can be altered by outside pressure and persuasion. A fully-developed incarceration industry would surely support one or more trade groups with high-minded names that would publicize crime statistics, contribute to campaigns for tough sentencing laws, and support law-and-order candidates. While "private prison operators will certainly lobby in their own behalf," one study argued, "it does not necessarily follow that they could

manipulate public opinion and the law-making process as easily as their opponents suggest."[89] Perhaps not. But the prospect of profit-motivated groups urging the community to deprive of liberty its delinquent members is repulsive enough to make objectionable even a small chance that such lobbying would succeed.

CONCLUDING COMMENTS

Are private prisons a good idea? Probably not. The evidence on potential cost savings is too weak and too questionable to warrant so radical and risky an experiment. There seems to be little room for major technical innovations in locking people up, while meeting the standards of humane incarceration which the public endorses and the judiciary firmly enforces. The cost of labor, moreover, which comprises about three-fifths of total prison budgets, probably cannot be reduced much without lowering the quality of the workforce.

Even if corrections entrepreneurs somehow succeed in cutting incarceration costs through improved management, there is unlikely to be enough competition, in any given community, to ensure that cost savings are passed on to the taxpayers, particularly after private contractors become entrenched. Indeed, private prison operators insist on long-term contracts which buffer them from competition.

Writing contracts that fairly and efficiently regulate relationships between governments and contractors is a delicate task that may well exceed the capacity of many local (and some state) governments. Our experience with managing profit-seeking firms providing defense equipment, health care, and other public goods warns against the expectation that contracts will be fully specified, competitively bid, and vigorously monitored and enforced.

The worst fears of the opponents of private corrections—widespread deprivation of constitutional rights; systematically worsened conditions; even a return to the chain gang—will probably not be realized. But the risk remains, of course, that the worse case will happen after all. The cost and trouble of guarding against such grim eventualities, moreover, must be counted as an important part of the case against privatization.

Corrections is a traditionally public and symbolically potent function. We should stifle our instinctive uneasiness about introducing profits into punishment only for far more compelling reasons than the case for private prisons can summon.

NOTES

1 See Peter Kihss, "Protection of Celebrities Remains a Small Part of Security Business," *The New York Times* December 21, 1980; Martin Tolchin, "Private Guards Get New Role in Public Law Enforcement," *The New York Times* November 29, 1985; Marcia Chambers, "California Swift, Costly Private Judicial System," *The New York Times* February 24, 1986; and Claudia M. Christie, "Private Justice," *New England Business* September 17, 1984.

2 Bureau of Justice Statistics *Bulletin*; October 1986; p. 1, Figure 1.

3 Ibid; p. 3, fig. 2.

4 See Michael Sherman and Gordon Hawkins, *Imprisonment of America*; (Chicago: University of Chicago Press, 1981); p. 46.

5 In only one hypothetical crime and sentence combination—a $50 convenience-store armed robbery earning a six-year prison term—did more people feel the sentence was too long than thought it was too short. Two-thirds found it about right. The source of this and the following several survey citations is the *American Public Opinion* microfiche series, 1985 compilation. The source for this citation is the North Carolina survey, Question 64.

6 University of Kentucky, October survey, Question 64.

7 Ibid, Question 10.

8 Florida State University's Annual Policy Survey, Questions 35 and 39. For similar poll results from New Mexico, see Zia Research Associates, January, 1985, survey; Question IX.

9 James Hirsch, "What's New in Private Prisons," *The New York Times* April 26, 1987.

10 Steven Binder, quoted in Martin Tolchin, "Companies Easing Crowded Prisons," *The New York Times* February 17, 1985.

11 Bureau of Justice Statistics *Bulletin* April 1985, Table 11; over 17,000 state prisoners were released early due to overcrowding in 1984 with Georgia, Michigan, and Tennessee accounting for most of these.

12 See Sherman and Hawkins; p. 29, pp. 32-33.

13 See American Correctional Association, *Standards for Adult Local Detention Facilities* (second edition); April, 1981; private prisons, it is worth noting, more often meet the standards than public facilities.

14 Massachusetts Legislative Research Council, "Report Relative to Prisons for Profit," July 31, 1986, p. 40, p. 58. This report, one of the best and most comprehensive compilations of information on the private prisons issue, will be designated LRC in later notes.

15 A number of studies are cited in Stephen D. Gottfredson and Ralph B. Taylor, *The Correctional Crisis: Prison Populations and Public Policy* (U.S. Department of Justice, National Institute of Justice, June 1983), fn. p. 1.

16 LRC, p.86.

17 See James Hirsch, "What's New in Private Prisons," *The New York Times* April 26, 1987; and LRC, p. 41.

18 Stuart Greenleaf, quoted in Martin Tolchin, "Prospect of Privately Run Prisons Divides Pennsylvania Legislators," *The New York Times* December 15, 1985.

19 "Prisons for Profit," editorial in *The Wall Street Journal* February 5, 1987. "As more private prisons are constructed," the *Journal* contended, "overcrowding should abate." One might ask the meaning of the word "private" here.

20 From data published in the Bureau of Justice Statistics *Bulletin*, July 1986, p. 2.

21 The figures are for the mid-1980's, and come from various tables in the 1987 Statistical Abstract of the United States. While jails account for nearly two-thirds of the facilities, they hold fewer than one-third of the prisoners. Ibid. Table 306, p. 173. There are also about 3,000 facilities for juveniles.

22 Not all states authorizing private corrections actually had any for-profit prisons or jails, and not all states experimenting with private corrections had formally authorized it. Kentucky contracted-out the management of a minimum-security prison without extensive legislative debate, and in Massachusetts—despite the passage of limited privatization legislation—Governor Michael Dukakis judged that "given the cost and control issues involved with privatization of corrections, I could not support any such effort in this area at this time." (Letter to legislative research director of April 28, 1986, cited in LRC, p. 32.)

23 Martin Tolchin, "Governors' Interest in Private Prisons Rising," *The New York Times* March 2, 1986; Pennsylvania subsequently opted for an indefinite moratorium on private prisons.

24 See Martin Tolchin, "As Privately Owned Prisons Increase, So Do Their Critics," *The New York Times* February 11, 1985; and Martin Tolchin, "Jails Run By Private Company Force It to Face Question of Accountability," *The New York Times* February 19, 1985.

25 See James Hirsch, "What's New in Private Prisons," *The New York Times* April 26, 1987.

26 See Kevin Krajick, "Prisons for Profit: the Private Alternative," *State Legislatures*, April 1984; and Martin Tolchin, "As Privately Owned Prisons Increase, So Do Their Critics," *The New York Times* February 11, 1985. Behavioral Systems Southwest also operates local jails.

27 See Krajick; see also Hirsch. Krajick suggests that RCA's Weaverville facility can be considered the first private prison.

28 See Krajick, p. 12.

29 See Tolchin, February 11, 1985. No damages were assessed against Fenton or other defendants, however, since the jury found that the circumstances justified the tactics the prison officers employed.

30 See American Bar Association, Section of Criminal Justice, Report to the House of Delegates, February 1986, p. 5.

31 See "Curb on Private Jails Voted by Pennsylvania Lawmakers," *The New York Times* March 20, 1986; see also LRC, pp. 32-33.

32 CCA's proposal is described in Jim Montgomery, "Corrections Corp. Seeks Lease to Run Tennessee's Prisons," *The Wall Street Journal* September 13, in Martin Tolchin, "Private Concern Makes Offer to Run Tennessee's Prisons," *The New York Times* September 13, 1985; and in Winthrop Knowlton, *Corrections Corporation of America* Kennedy School of Government Case C15-85-646, 1985.

33 T. Don Hutto quoted in Krajick, p. 11; see also Knowlton, pp. 9-11.

34 Lucius Burch memo, excerpted in Knowlton, pp. 9-11.

35 Ted Nissen, quoted in Martin Tolchin, "As Privately Owned Prisons Increase, So Do Their Critics," *The New York Times* February 11, 1985.

36 From a 1985 position statement cited in LRC, p. 85. It may or may not be significant that T. Don Hutto, CCA's Executive Vice-President, was then the Association's president-elect. In any event, the endorsement prompted the American Federation of State, County, and Municipal Employees to withdraw from the Association.

37 Cited in LRC, pp. 48-49.

38 J. Michael Keating, Jr., *Seeking Profits in Punishment*, 1985; excerpted in LRC, p. 51.

39 American Bar Association, Section on Criminal Justice, Report to the House of Delegates, February 1986, p. 1. The ABA statement carefully defines "privatization" as delegation of overall management responsibility, and does not discourage the contracting-out of construction and other prison services. For background on the ABA conference at which the resolution was debated and adopted, see Martin Tolchin, "Bar Group Urges Halt in Use of Privately-Run Jails," *The New York Times* February 12, 1986.

40 Quoted in LRC, p. 82. Another factor behind the ACLU's position may be its objections to the American enthusiasm for locking up delinquents. The ACLU is a leading proponent of the alternatives-to-incarceration school of corrections thinking, which calls for a greater reliance on parole and probation and innovations like electronic detention, as well as alternative punishments like community service and victim restitution. Many in the ACLU are troubled by the rush to expand prison capacity. Contending that prison sentences are perversely elastic with respect to the supply of prison cells, these critics are appalled at the prospect of creating a new industry with its profits pegged to the incarceration rate.

41 Charles R. Ring, "Private Prisons Need a Fair Trial," *The Wall Street Journal* May 8, 1987.

42 See Joan Mullen et al., *The Privatization of Corrections* (U.S. Department of Justice, National Institute of Justice, February 1985), pp. 56-58; and LRC, pp. 48-49.

43 The Silverdale Work Farm is here considered to be a prison; the other is Kentucky's Marion Center.

44 Cost data are for 1984, calculated from Statistical Abstract 1987, No. 304, p. 172.

45 Quoted from Hirsch.

46 See Mullen, p. 68.

47 For example, see Regina E. Herzlinger and William S. Karasker, "Who Profits from Nonprofits," *Harvard Business Review* 1987, No. 1, January - February; and letters on that article in the subsequent issue, especially the letter by Arnold Relman, the editor of the *New England Journal of Medicine*, printed pp. 134-135. See also Tamar Lewin, "A Sharp Debate on Hospitals," *The New York Times* March 2, 1987.

48 But see below for a fuller explanation of the contract.

49 Dee Dudley Clendinen, "Officials of Counties Debate Private Jail Operation," *New York Times* November 14, 1985.

50 Corrections Corporation of America, 1986 Annual Report, Statement of Operations, p. 20.

51 The figures in Table 1 are computed from data compiled from various published and unpublished official sources in the Statistical Abstract 1987, No. 299, p. 171.

52 See LRC, p. 79.

53 See Ibid, Table 1, p. 80.

54 If this assumption is mistaken—if there is room for significant technical progress in incarceration, if such innovations are the source of the private sector's advertised cost advantage, and if firms can be constrained to compete on the basis of such innovation—then I am underestimating the potential for efficiency gains through private management.

55 In fiscal 1983 total public spending on corrections was $10.4 billion, while the October payroll was $515 million; multiplying that by 12 gives $6.18 billion, or 59 percent of the total. Data are from the Bureau of Justice Statistics *Bulletin*, July 1986.

56 Bella English, "Prisons: System in Crisis—Toll Tells on Everyone," *Boston Globe* June 1, 1987.

57 See the article by English, and other related pieces from May 30 and June 2, 1987. Corrections Corporation of America claims that private prisons will offer such superior working conditions that guards will require less of a hardship premium, allowing a better caliber of worker to be hired at lower wages (see LRC, p. 71); whether this can lead to *net* cost savings is debatable.

58 Data from 1980 Census of Population: Earnings by Occupation and Educa-

tion, Volume 2 (U.S. Department of Commerce, Bureau of the Census, May 1984) Table 1.

59 Source: 1980 Census.

60 The Census data show that private workers and public workers are paid roughly the same at each age and education level; indeed, college graduates working full-time as private security guards actually make more than their counterparts in the public sector.

61 See LRC, p. 112 and note 2, p. 113.

62 See Oliver Williamson, *Markets and Hierarchies* (New York: The Free Press, 1983) p. 68.

63 Prudential-Bache Securities, Company Report on CCA, April 3, 1987, p. 9.

64 Quoted in Mullen, p. 69.

65 A report by the American Correctional Association cites the contracting issue without really recognizing the difficulty of writing and enforcing comprehensive contracts. A private corrections center, it explains, "is only as good as the staff, management, program, facilities, resources and support that it receives; the formula for success is no different than publicly operated institutions. What does differ, though, is the need to have a tightly structured contract in order that the private sector...be held accountable." American Correctional Association, "Private Sector Operation of a Correctional Institution", published by the National Institute of Corrections, U.S. Dept. of Justice; April 1985, p. 60.

66 See Martin Tolchin, "Privately Operated Prison in Tennessee Reports $200,000 in Cost Overruns," *The New York Times* May 21, 1985.

67 See Krajick, p. 10 and LRC, pp. 64, 75.

68 A $1 million risk borne by Elwood, Indiana is obviously less diffused than one borne by General Motors, but the basic point holds true.

69 Title 42 U.S.C. Section 1983.

70 Medina v. O'Neill, 589 F. Supp. 1028 (1984).

71 Money can be saved by packing prisoners into cells instead of expanding capacity; by niggardliness in providing food, clothing, and shelter; by terrorizing inmates into submission to cut the risk of rebellion; by hiring mentally or morally defective guards who come cheap because no other employer will have them; and so on.

72 John J. Dilulio, Jr., "Private Prisons," unpublished discussion paper, May 1987, p. 8. Krajick (p. 12) discusses the 19th-century system whereby inmates were leased out as slaves to factories and plantations.

73 Martin Tolchin, "Jails Run by Private Company Force it to Face Question of Accountability," *The New York Times* February 19, 1985.

74 For example, Rev. Thomas Sheehy, who served as chaplain at CCA's Houston detention center, endorses private management: "If I had my choice of this private organization, or it being run by the Immigration and Naturalization

Service, I would take this private organization. They're much more humane. The guards haven't been in the business that long, so they're not calloused." Martin Tolchin, "As Privately Owned Prisons Increase, So Do Their Critics," *The New York Times* February 11, 1985.

75 The National Institute of Justice's study of prison privatization, for example, is studded with warnings about "judicious contractor selection and monitoring procedures . . . care in defining admission criteria and restraining the discretion of private providers" and so on. See Mullen, especially the last section.

76 Oral presentation at a San Francisco conference, September 1985, cited in LRC, p. 60.

77 The National Institute of Justice study notes this potential. "On balance, it is entirely likely that private institutions will receive fairly intense scrutiny, in the short term . . . Whether this interest will be sustained in the long term remains unclear." Mullen, p.74.

78 See Martin Tolchin, "Companies Easing Crowded Prison," *The New York Times* February 17, 1985; and Krajick, p. 9.

79 Recall the remarks of the E.F. Hutton official quoted earlier.

80 The director of the Federal Bureau of Prisons sees such motives at work. "Everybody wants a Band-aid solution. A number of politicians may use privatization to avoid facing up to the real problems." Norman Carlson, quoted in Martin Tolchin, "As Privately Owned Prisons Increase, So Do Their Critics," *The New York Times* February 11, 1985.

81 While the overall male population aged 20 to 29 peaked in 1984 and is expected to decline, the number of *black* males in that age group is expected to keep rising, according to two scholars. "If black incarceration rates continue at their current level . . . the expected decrease in prison populations may not happen . . ." James Austin and Barry Krisberg, "Incarceration in the United States," *Annals of the American Academy of Political and Social Science* March 1985, p. 25.

82 See Mullen, pp. 73-74 and LRC, p. 62.

83 Quoted in Martin Tolchin, "Jails Run by Private Company Force it to Face Question of Accountability," *The New York Times* February 19, 1985.

84 Prof. Ira Robbins of American University Law School finds "something anomalous about a person . . . being charged by a private corporation with an institutional infraction." Martin Tolchin, "As Privately Owned Prisons Increase, So Do Their Critics," *The New York Times* February 11, 1985.

85 The Massachusetts study noted that "in many instances, the only witnesses to a disciplinary infraction will be a private employee, the accused, and perhaps other inmates. Under such circumstances, it is for all practical purposes probably impossible to completely eliminate private employees involvement in disciplinary proceedings." LRC, p.98.

86 Martin Tolchin, "Experts Foresee Adverse Effects from Private Control of Prisons," *The New York Times* September 17, 1985.

87 Ibid.

88 Kenneth F. Schoen, "Private Prison Operators," *The New York Times* March 28, 1985.

89 LRC, p. 57.

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